SUPREME COURT, U.S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Docket No. 1660

STANLEY J. POLACK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Opinion Below

The only opinion below is that of the Third Circuit, appended hereto. It is as yet unreported.

Statement of Jurisdiction

The date and time of entry of the judgment of the Third Circuit, here sought to be reviewed, is April 5, 1971.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. 1254.

Questions Presented for Review

1. Does failure to file a tax return on time as required by 26 U. S. C. 6001, where the Government actually receives reports and withholding tax payments on more than 95% of defendant's total income on time, constitute a wilful violation of 26 U. S. C. 7203, beyond a reasonable doubt, where the balance of tax due is minimal and insignificant, and the defendant mistakenly, but reasonably, believes that no further tax is due?

2. Did not the trial court commit plain error and a miscarriage of justice in charging the jury that "whether or not any taxes were due and owing for any of the years involved is beside the point" (D411a-23, 24)?

3. Did not the defendant suffer ineradicable prejudice and a miscarriage of justice by reason of the arguments in the Government's summation, emphasizing the fact that the defendant was a county judge, wearing black robes, and dispensing criminal justice?

4. Did not the trial court commit plain error and a miscarriage of justice in permitting to be answered questions on cross-examination of the defendant's character witnesses as to (a) whether the news of the failure by a county judge timely to file tax returns was a blow to and shocked the witness and other lawyers, (b) whether a judge's conduct should be free from impropriety, from the appearance of impropriety and from infractions of the law, and (c) whether one witness would have moved the defendant for confirmation of his appointment as a judge, putting the defendant on the bench "with a black robe around his shoulders, sitting in judgment in criminal cases * * * returning that kind of man to the bench"?

Statutes Involved

26 U. S. C. 7203 provides:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

26 U. S. C. 6001 provides:

> "Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe. Whenever in the judgment of the Secretary or his delegate it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title."

Statement of the Case

Defendant, a county court judge for Passaic County, New Jersey, was convicted upon a jury verdict in the District Court for New Jersey of willfully failing to file federal income tax returns for the years 1962, 1963, 1964, 1965 and 1966, in violation of 26 U. S. C. 7203.

It was stipulated at the trial that the returns covered under the Information at bar, i.e., for the years 1962, 1963, 1964, 1965 and 1966, were, in fact, filed June 3, 1968 (D37a-18 to 38a-5).

It was further stipulated that the balances due in each of the years involved beyond the amounts withheld by the County in withholding taxes were also paid at the time and that the 1966 return showed there was a refund due the taxpayer of $44.00 (D38a-23 to 41a-2).

The tax returns filed for each of the years 1962, 1963, 1964, 1965 and 1966 established that practically all of the defendant's taxable income was derived from his judicial salary for which the County of Passaic filed W-2 returns and paid withholding taxes to Internal Revenue each year as and when due. *More than 95%* of defendant's total income in each of the years in question came from his salary as a Judge in each of the years in question and other income above the salary income was minimal for each of the years involved (D44a-5 to 9; D53a-16 to 21; D149a-1 to 6).

The financial pattern disclosed by the undisputed evidence was as follows:

Year	*Judicial Salary Subject to Withholding Tax*	*Other Income*	*Total Tax Due*	*Amount of Withholding Taxes Paid by County of Passaic direct*		*Unpaid Balance, of Tax or Refund due*
1962	$19,999	$984	$3,466	$2,999		$467
1963	21,011	926	3,888	3,181		707
1964	21,999	670	3,707	2,753		954
1965	24,528	594	4,094	2,968		1,125
1966	27,000	620	4,116	4,159	(R)	44
1967					(R)	1,003
1968					(R)	431

(Average yearly unpaid balance, including refunds, 1962 to 1967—$367.67.)

(See Exhs. G4 to G8 incl.; D37a-19 to 38a-5; D38a-23 to 41a-2; D319a-15 to 19; D320a-3 to 4).

The evidence further shows that the Information did not include the year 1967 for which defendant filed a return at the same time as the prior five years, i.e., on June 3, 1968. Special Agent Josephson, the Government witness, admitted that the defendant told him he knew that he was required to file an income tax return for each of the years involved and that "he anticipated that the withholding tax that had been deducted from his salary would equal the net tax due on his return for each year" (D51a-21 to 26).

Special Agent Josephson further testified that the defendant had again given him the reasons why he had not filed for the years in question and that he again stated that "he firmly believed that the withholding tax would cover the tax due" (D135a-11 to 16).

On cross, Josephson testified that the defendant told him that there was never any intent to avoid his tax responsibilities, that it was his firm belief that the withhold-

ing tax covered the taxes due, and that his computation only confirmed this belief (D171a-16 to 172a-1).

Defendant testified, in his own behalf, that he was always under the impression that the withholding tax, that was quite substantial, covered his tax liability to the Government (D254a-11 to 15).

As we have seen, chart *supra,* for 1966 the defendant was entitled to a refund of $44.00.

On cross, defendant testified (D264a-11 to 15):

> "* * * It was never my intention to do something which is evil-minded or criminally minded. There was laxity, there was negligence. I never took the position that there was not. And I still don't take that position."
>
> "* * * And I repeat that there was laxity and negligence in not having been able to find time to get a return out on the 15th of April of the year ensuing the year that the tax had to be reported on, but *I was never motivated with any wrongful intent,* or *an evil intent,* or *any criminality.*" (D270a-3 to 8)

The defendant further testified that he intended to file all his returns as soon as "I was physically able to do so. I was hopeful that I could file those returns not piecemeal but as a package unit." (D266a-11 to 18) He conceded that he may have been lax and negligent, but certainly, "it wasn't done as a result *of some design or mental determination to do wrong.*" (D273a-7 to 12)

He intended some day to file, as soon as he was able (D273a-11, 12).

> "While I felt put out and disappointed that I did not get out the '59 return by April 15, 1960, I truly felt

that the most that will happen is, upon the filing of the delayed returns, I will get an invoice, as I did for the previous three years, an invoice for interest and the civil penalty for the delinquent filing." (D283a-20 to 25)

"Q. And you felt that with respect to each return starting with 1959 up through 1966, is that your testimony? A. I believe so." (D284a-1 to 3)

"I knew that the return was due from me. And I knew that eventually I will do it. *But I was not conscious of committing any crime.*" (D288a-3 to 5)

He further testified that it was after the first full year of judicial duties or the year when he became a *full-time judge that his difficulties started,* because he was put in an area where he was required to learn a lot of new things, as a full-time judge and this difficulty carried over into 1960 as well and "not only that, the family responsibilities became more serious and grave with each year, as the children grew up" (D270a-9 to 271a-2).

He testified further that he got in touch with the government *before* Intelligence entered the case pursuant to the government's letter of August 17, 1967 and that while the returns for the years in question were filed after the commencement of the investigation by Intelligence, "the returns would have been filed without the investigation" (D286a-4 to 25).

He further testified that "he filed as a group, as a package for all the years" and explained that he did not file in 1963 for 1962 and 1963 "because of family tensions, pressures and absorption in full time work. There was hardly a day that I came home from court before 7 o'clock, all those years, because I really was bent on doing the best I could" (D287a-13 to 24).

The trial court charged the jury, *inter alia* (D411a-23, 24):

> "* * * Whether or not any taxes were due and owing for any of the years involved is besides the point."

During the cross-examination of the defendant's character witnesses, the trial judge permitted the following questions to be answered:

> "Q. The disclosure that Judge Polack, this judge whom you respected, who enjoyed the privilege of being a judge in Passaic County, * * * the news that he had failed to file income tax returns for the years (1962) through 1966 must have come as quite a blow to all of you lawyers, didn't it?" (D335a-12 to 23)
>
> "Q. * * * Do the members of the Bar of Passaic County believe that judges should adhere to the law?" (D342a-10 to 12)
>
> "Q. And I suppose again exploring your own standards of conduct to be followed by a judge—that you don't feel that a judge's ability to sit in judgment of others is impaired at all by the fact that he, in this particular case, failed to file returns in violation of the statute I read, do you?" (D347a-6 to 19)
>
> "Q. Do you agree that a judge's conduct, whether it be official or unofficial, should be free from impropriety and the appearance of impropriety; * * *
>
> "Q. Do you agree that a judge should avoid infractions of the law? * * *
>
> "Q. Do you believe that his personal behavior, not only upon the bench and in the performance

of his judicial duties, but also in his every-day life should be beyond reproach?" (D359a-19 to 360a-11)

"Q. And you recognize that in so moving him (for confirmation as a judge), you then would be putting him on the bench, with a black robe around his shoulders, sitting in judgment in criminal cases * * *?" (D362a-6 to 10)

"Q. The truth to you includes returning to the bench, and sitting in judgment in all kinds of cases, criminal cases, civil cases, charging a jury on what the law is, returning that kind of a man to the bench, who violated the statute that you say you were familiar with?" (D365a-4 to 10)

"Q. * * * (Former) Senator Hull, are you familiar with the conduct or standards of conduct imposed upon a judge by the Canons of Judicial Ethics?" (D354a-15 to 24)

"Q. And you would have moved him, sir, knowing that after confirmation he then would be sitting in judgment in criminal cases?" (D363a-1 to 15)

The Government's summation at the trial presented the following arguments to the jury, *inter alia*:

"And yet this judge, the man who donned the black robe every morning from 1959 to 1967, the lawgiver, day in and day out assumed that bench, having just gotten by, by the skin of his teeth, in the late fifties, because there concededly and admittedly he had filed voluntarily, and late" (D389a-19 to 24).

"And that—if it doesn't shock you—shocks me, because I put that against the background of lawgiver, a dispenser of justice. I, as a lawyer, put it in that framework" (D390a-12 to 15).

"In 1963 he gives a party to which presumably are invited guests at his swearing in, when he takes the oath to uphold the law. Is this the kind of law that they want practiced in the County of Passaic? As a footnote to that, I must acknowledge that apparently the president of the Passaic County Bar Association, Mr. Roemer, has a standard that I say is at odds with mine. He apparently thinks it makes no difference. He wants you to, in effect, invite the judge to go back on the bench. And Mr. Hull—the man who said 'stupid, but not wilful'—he would have you, too, invite the judge back on the bench" (D391a-20 to D392a-6).

"But what was the attitude? The attitude of a man who said, 'Send me back to the bench to be a judge. Even though all the people up in Passaic—the women, the children, the men—know that I had failed to file tax returns for all these years, send me back to the bench, because this has nothing to do with my being a judge.'

"Well, I submit to you that, in this day and age, if anybody should be above reproach—like Calpurnia, like Caesar's wife—if anybody should be above suspicion, it is a judge. Does he want to continue to function to dispense justice in criminal cases, to have a man in the dock before him looking him in the eye, knowing that this man himself has breached his obligation? That is what he wants from you" (D394a-9 to 23).

"Ladies and gentlemen, * * * you knew before you took the oath (of jurors) that the defendant was a judge. * * * And you took it only after assuring me that any sympathy, any compassion that you might feel would not interfere one iota with your deliberation of the facts, * * *

"Next, and finally, a man who has sat as a judge, since 1959 full-time, had never seen fit to file a tax return in all the years until Internal Revenue Service came after him, is this what we need in these times, in your community and mine? Is this what we need today?" (D394-24 to 395a-19)

ARGUMENT

(*Italics ours, unless otherwise noted.*)

POINT ONE

The trial court committed plain error and a miscarriage of justice in permitting to be answered the quoted questions on cross-examination of the defendant's character witnesses.

"In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson,* 297 U. S. 157, 160 (1936); *Silber* v. *United States,* 370 U. S. 717, 718 (1962). Such *is* the case presented here.

> "Every litigant has the legal right to a *fair* and impartial trial of the *issues* which his case presents according to the law and the evidence applicable to *those* issues alone. The submission to the jury for their consideration of *extraneous* issues, or of evidence which is neither relevant nor material to the *questions* upon trial, is a violation of this right, and it constitutes a *fatal* error, be-

> cause it tends to withdraw the attention of the jury from the issues *actually* involved, and to lead them to decide the case upon *false* issues, and in that way to reach an erroneous result." *Sparks* v. *Territory of Oklahoma,* 146 F. 371, 373 (8th Cir. 1906).

And in *Dunn* v. *United States,* 307 F. 2d 883, 886 (5th Cir. 1962), the court says:

> "* * * We are always concerned with guilt and innocence in criminal cases; but of equal importance is a fair trial to guilty and innocent alike. Trials are rarely, if ever, perfect, but gross imperfections should not be unnoticed.
>
> "* * * It is better to follow the rules than to try to undo what has been done. Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'"

POINT TWO

The defendant suffered ineradicable prejudice and a miscarriage of justice by reason of the quoted arguments in the Government's summation.

In the instant regard, there is a conflict between the decision of the Third Circuit in the case at bar and a decision of the Fifth Circuit. In the third paragraph of the opinion of the Third Circuit in this case, the court says:

> "* * * This court has stated in United States v. Sober, 281 F. 2d 244, 250 (C.A. 3), cert. denied, 364

> U.S. 879 (1960), 'Every defendant is of course jealously protected against inflammable statements not based *upon the evidence* or fair and reasonable deductions from it . . .' Statements of this nature, however, are not present in the instant case. *Appellant* raised at trial the *fact* that he was a judge, that he heard civil and criminal matters, and that he had a reputation for honesty in the community. We cannot agree that the Government's reference to *facts* raised by *appellant* during the course of trial are improper and constitute reversible error."

On the other hand, the Fifth Circuit, in *Turner* v. *United States,* 415 F. 2d 1234, 1236 (1969), says:

> "There is no dispute that the U. S. Attorney's statements were based on *testimony* in the trial. The rub is that the information provided by the U. S. Attorney's statements is *wholly unrelated to the charge* and thus had no tangible connection to the prosecution's case, except perhaps to have inflamed the jury * * *."

It is true that this Court, in *Viereck* v. *United States,* 318 U. S. 236, 247 (1943), says:

> "* * * In his (the prosecuting attorney's) closing remarks to the jury he indulged in an appeal wholly irrelevant to any *facts* or *issues* in the case, the purpose and effect of which could only have been to arouse passion and prejudice."

That statement would not seem to *require* that, in order to be prejudicial, the inflammatory remarks must be irrelevant to any *facts,* as *well* as any *issues,* in the case. It just so happened, in the *Viereck* case, that the closing remarks were irrelevant to any facts *or* issues in the case.

The summation at bar was plainly prejudicial. In *State* v. *Simmons,* 368 P. 2d 378 to 381 (Sup. Ct. of Wash. 1962), the court says:

> "The issue here is whether a defendant convicted of assault with intent to commit rape had a fair trial. "Our conclusion is that he did not. * * *
>
> "(379) * * * When you translate this anonymous man into a municipal judge presiding over the state's busiest traffic court and add the further fact that the woman came to see him in his official capacity about a traffic ticket, which he admits he 'fixed' for her after the incidents to which we have referred, the picture worsens. But it was not because of any of *these* derelictions that he was being tried; the charge was assault with intent to commit rape. * * *
>
> "We shall not attempt a full-scale review of all the assignments of error, but shall content ourselves with enough instances of obviously prejudicial error to make it clear that a new trial is necessary. * * *
>
> "(380) The state, capitalizing on the concept that a judge—like Caesar's wife—should be above suspicion, lost no opportunity to make it clear to the jury that this particular judge was not only not above suspicion, but that he was dragging his judicial robes in the gutter. The following questions, asked the witness Tedzak (a bartender) on cross-examination, makes clear the *modus operandi.*
>
> "'Do you know that Judge Simmons is a married man with three children, Mr. Tedzak?'
>
> "'Mr. Tedzak is it your testimony that Judge Simmons takes off his black robes and comes down—'
>
> "'And goes into a public place—'

"'Is it your testimony, Mr. Tedzak, that Judge Simmons, a well-known person in this community—'

"'And would you feel that it was somewhat strange for a Judge to be kissing a person' * * *

"The state followed this up with the following statement, made at the very end of its closing argument to the jury:

"'I submit to you that there should be no room for sympathy in your hearts for this man. He has violated every trust that anyone ever put in him.' * * *

"(381) The usual excuse for improper argument * * * is quite inadequate to explain why the theme of betrayal of a public trust is the last thing which the jury heard from the prosecution as it closed its case on a charge of assault with intent to commit rape."

Here, too, the theme of betrayal of a public trust was the last thing which the jury heard from the Government as it closed its case on a charge of failure to file income tax returns (D394a-16 to D395a-19):

"Well, I submit to you that, in this day and age, if anybody should be above reproach—like Calpurnia, like Caesar's wife—if anybody should be above suspicion, it is a judge. Does he want to continue to function to dispense justice in criminal cases, to have a man in the dock before him looking him in the eye, knowing that this man himself has breached his obligation? That is what he wants from you.

"Ladies and gentlemen, I asked you at the outset of this case * * * (395a) * * * to understand that when you took an oath to render a true verdict you were assuming a very, very difficult burden, to sit

> in judgment of a man who was sitting at a summit. And you knew before you took the oath that the defendant was a judge. * * * And yet you took the oath. And you took it only after assuring me that any sympathy, any compassion that you might feel would not interfere one iota with your determination of the facts, * * *
>
> "Next, and finally, a man who has sat as a *judge* since 1959 full-time, had never seen fit to file a tax return in all the years until Internal Revenue Service came after him, *is this what we need in these times, in your community and mine?* Is this what we need today?"

In *Barlow* v. *State*, 233 So. 2d 829, 831 (Sup. Ct. of Miss. 1970), the court says:

> "In regard to the third issue, the record reveals that the case was tried in a vigorous and hostile manner by the district attorney. It might be noted that anger and wisdom seldom abide together, and this is true in the case at bar. It was prejudicial error for the district attorney to ask the following questions:
>
> > "'Q. So wouldn't you agree with me that a justice of the peace making that kind of money at the expense of the taxpayer ought to be honest? * * *
> >
> > "'Q. You made enough money there that you could have been honest?'
>
> "Though both questions were objected to and the objections were *sustained* by the court as being improper, the effect nevertheless was to prejudice the jury and thus this is reversible error."

In *disciplinary* or *removal* cases, the fact that an attorney is also a judge *is* relevant to the issues. In the case of *In re Boyle,* 47 N. J. 58, 59 (1966), the court says:

> "* * * The gravity of respondent's conduct is aggravated by the fact that he was a magistrate at the time of his derelictions. The confidence of the public in the bar is especially affected where a member of the judiciary is involved in misconduct. A lapse of integrity on his part has an especially deleterious effect on the standing of all lawyers in the community."

And in the case of *In re Gurnik,* 45 N. J. 115, 116 (1965), where Gurnik had pleaded nolo contendere to a federal charge of attempted tax evasion, the court says:

> "* * * In the present case Gurnik's duty to conform his conduct to the requirements of the law was of greater magnitude than that of the ordinary attorney. In 1955 and in 1956 when the infraction of the tax law was committed and the return filed, he was a municipal court magistrate, a position of high public trust. Under the Canons of Judicial Ethics his conduct in every particular was required to be 'beyond reproach,' and he had a 'unique responsibility for the popular image of the entire [judicial] system.'"

In 2 removal cases, the following was held:

> "The office of judge is one in which the general public has a deep and vital interest, and, because that is true, the official conduct of judges, as well as their private conduct, is closely observed. When a judge, either in his official capacity or as a private citizen, is guilty of such conduct as to cause

> others to question his character and morals, the people not only lose respect for him as a man but lose respect for the court over which he presides as well."

Stanley v. *Jones*, 201 La. 549, 9 So. 2d 678, 683 (1942); *In re Haggerty*, 257 La. 1, 241 So. 2d 469, 478 (1970).

In the case at bar, the defendant was not on trial to determine his fitness to remain on the bench or as a member of the bar. He was on trial on a *criminal* charge of failure to file income tax returns. The evil in both the quoted cross-examination of the defendant's character witnesses and the quoted remarks on the Government's summation is that both features of the case may well have led the jury to believe that they could convict the defendant because there is *no* excuse for a *judge* when *he* fails to file timely income tax returns. In such a situation, prejudice is palpable. "(I)f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is, rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave *doubt*, the conviction cannot stand." *Kotteakos* v. *United States*, 328 U. S. 750, 765 (1946).

POINT THREE

In view of the facts that the Government actually received reports and withholding tax payments on more than 95% of defendant's income on time, that the balance of tax due was minimal and insignificant and that defendant mistakenly, but reasonably, believed that no further tax was due, wilfulness was not proven beyond a reasonable doubt, and the trial court erred in charging the jury that "whether or not any taxes were due and owing for any of the years involved is beside the point."

When one takes into account the facts that the Government actually received reports and withholding tax payments on more than 95% of defendant's income *on time,* that the balance of tax due was minimal and insignificant and that defendant mistakenly, but reasonably, believed that no further tax was due, the question whether or not any taxes were due and owing for any of the years involved is not "beside the point," but is quite relevant as to wilfulness. It is respectfully suggested that the question of the effect of the timely filing of and payment upon W-2 forms on the issue of wilfulness of a failure to file an income tax return is ripe for decision by this Court. Our careful search of the authorities and the annual reports of the Commissioner of Internal Revenue fails to disclose any other case where any individual was ever *prosecuted* criminally for failing to file a return where the tax due on almost all of the individual's income was withheld at the source and actually paid to the Government on time. See Schedule on the next page.

THE FOLLOWING STATISTICAL DATA WAS COMPILED FROM THE ANNUAL REPORTS OF THE COMMISSIONER OF INTERNAL REVENUE FROM 1962 TO 1969 INCLUSIVE:

Year	*No. of Income Tax Returns Filed (millions)*	*No. of Prosecutions Recommended in Fraud Cases*	*No. Convicted After Trial in fraud cases*	*No. of Delinquent Filings without criminal prosecution*	*Assessments Collected on Delinquent. Filings (millions)*
1962	71.4	955	94	935,000	164.5
1963	72.5	994	83	981,000	186.6
1964	74.19	1,032	121	1,100,000	275.5
1965	76.1	1,216	73	396,915	83.289
1966	79.1	1,163	70	766,000 +	190.0
1967	81.5	1,010	62	766,000	262.7
1968	83.5	952	89	770,587	293.1
1969	86.7	1,049	79	740,000	253.0

The *1962* and *1963* figures above can be found in the 1963 Report at pages 13, 22, 23 and 24.

The *1964* figures above can be found in the 1964 Report at pages 11, 19, 20 and 21.

The *1965* figures above can be found in the 1965 Report at pages 12, 15, 29 and 31.

The *1966* and *1967* figures above can be found in the 1967 Report at pages 16, 29, 32 and 33.

The *1968* figures above can be found in the 1968 Report at pages 13, 26, 29 and 30.

The *1969* figures above can be found in the 1969 Report at pages 12, 24, 28 and 29.

None of the reports of the Commissioner of Internal Revenue between 1962 and 1969 discloses any criminal prosecution in cases involving a willful failure to file a return under Sec. 7203 where withholding taxes were collected on most of taxpayer's income.

Each of the annual reports contains statistics only on fraud prosecutions which include income and excise tax cases for corporations as well as individuals.

The nearest that this Court has come to the instant question in *Spies* v. *United States,* 317 U. S. 492, 495 (1943), wherein this Court says:

> "The United States has relied for the collection of its income tax largely upon the taxpayer's own disclosures rather than upon a system of *withholding the tax from him by those from whom income may be received.*"

Now—and for years past—the United States relies for the collection of its income tax largely upon a withholding of the tax from public and private employees and officers by their public and private employers. Needless to say, the said employees and officers rely upon their employers for the correct calculation and payment of the taxes withheld. "Congress did not intend that a person by reason of a bona fide misunderstanding as to his duty to make a return, or as to the adequacy of the records he maintained, should become a *criminal* by his mere failure to measure up to the prescribed standard of conduct." *United States* v. *Murdock,* 290 U. S. 389, 396 (1933).

CONCLUSION

It is therefore respectfully urged that this petition for writ of certiorari be granted.

Respectfully submitted,

NICHOLAS MARTINI,
Attorney for Petitioner.

SAM WEISS,
Of Counsel.

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals

(Filed April 5, 1971)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 18,424

UNITED STATES OF AMERICA

v.

STANLEY J. POLACK,

(D. C. Criminal No. 169-69)

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued October 8, 1970

Before

KALODNER, STALEY and GIBBONS,
Circuit Judges

STALEY, *Circuit Judge.*

Appellant, a county court judge for Passaic County, New Jersey, was convicted of willfully failing to file Fed-

eral Income Tax returns for the years 1962, 1963, 1964, 1965, and 1966, in violation of Title 26 U.S.C. §7203.[1]

This appeal followed.

Appellant contends that he suffered ineradicable prejudice and a miscarriage of justice as a result of comments made in the Government's summation, which emphasized that he was a county judge. Appellant further contends that the district court committed plain error in permitting irrelevant and prejudicial questions of appellant's character witnesses on cross-examination and that the court erred in its charge to the jury on the element of willfullness.

Appellant's argument concerning the comments made during the Government's summation is without merit. We note at the outset that appellant did not raise timely objection to the summation. This standing alone, except in cases of flagrant abuse not present here, will bar him from raising this point on appeal. United States v. Socony Vacuum Oil Co., 310 U.S. 150, 238-239 (1940); United States v. Murphy, 374 F.2d 651, 655 (C.A. 2), cert. denied, 389 U.S. 836 (1967). Even assuming that objections had been timely raised, we fail to see how references to the appellant's judicial position can be said to be prejudicial and inflammatory. The Government, for instance, referred to the appellant as "the man who donned the black robe," "the lawgiver," and "a dispenser of justice." These references were not part of a persistent and calculated attack on the character of the defendant. This court has stated in United States v. Sober, 281 F.2d

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[1] The statute provides that "any person . . . required by this title . . . to make a return . . . who willfully fails to . . . make such return . . . shall . . . be guilty of a misdemeanor. . . ."

244, 250 (C.A. 3), cert. denied, 364 U.S. 879 (1960), "Every defendant is of course jealously protected against inflammable statements, against prejudicial statements not based upon the evidence or fair and reasonable deductions from it. . . ." Statements of this nature, however, are not present in the instant case. Appellant raised at trial the fact that he was a judge, that he heard civil and criminal matters, and that he had a reputation for honesty in the community. We cannot agree that the Government's reference to facts raised by appellant during the course of trial are improper and constitute reversible error. "To say that this remark would have a prejudicial effect on a jury which had listened throughout a long trial to the unfolding of the testimony is to attribute a stupidity and absence of common sense which is incredible in a federal jury." United States v. Kravitz, 281 F.2d 581, 586 (C.A. 3, 1960), cert. denied, 364 U.S. 941 (1961).

Appellant next contends that the district court erred in permitting cross-examination of his character witnesses on matters that were irrelevant. He specifically takes issue with questions such as whether one witness, a lawyer, was shocked by the news that a local judge had failed to file returns and whether this news was a blow to and shocked the witness and other lawyers; whether another witness believed that a judge's conduct should be free from impropriety, from the appearance of impropriety, and from infractions of the law, and whether the latter witness, a former State senator, would have moved for confirmation of the appointment of appellant as a judge, putting him on the bench "with a black robe around his shoulders, sitting in judgment in criminal cases," "returning that kind of a man to the bench." It is a fundamental principle of law that the scope of the Government's cross-

examination of defense character witnesses is determined by the trial court as a matter of discretion and the ruling of the trial court will be disturbed only "on clear showing of prejudicial abuse of discretion." Michelson v. United States, 335 U.S. 469, 480 (1948). We do not find an abuse of discretion in the instant case. Defendant had voluntarily put his reputation in issue and had thus made it a proper area for cross-examination, Michelson v. United States, supra. The Government's cross-examination of these character witnesses went to their knowledge of the appellant's reputation and to the witnesses' standard of good repute. The facts upon which these witnesses were cross-examined were relevant to issues raised by the appellant.[2]

Appellant further contends that the district court erred in its charge to the jury on the element of willfullness. The instructions given adequately stated the law governing the element of willfullness and were in accord with this court's holding in United States v. Vitiello, 363 F.2d 240 (C.A. 3, 1966); and United States v. Palermo, 259 F. 2d 872 (C.A. 3, 1958). Even assuming arguendo that the instructions as given were incorrect, no objection was made to them by appellant as required by Rule 51, F.R. Civ. P., 28 U.S.C.[3] Rule 51 thus precludes him from

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[2] An examination of the record shows that the Government's cross-examination of appellant's character witness was a proper inquiry into testimony voluntarily elicited from the witnesses on direct examination. Three of these witnesses either voluntarily or in response to questions by appellant's counsel offered testimony upon which the Government had a right to cross examine.

[3] The district court twice instructed the jury on the element of willfullness; once in its initial charge, and again in a supplemental charge given in response to a question by the jury. Following each of these instructions, appellant's trial counsel specifically did not take exception to the instruction given by the court.

raising this objection for the first time on appeal. We cannot say that the charge was so fundamentally unfair as to have resulted in a gross miscarriage of justice. United States v. Atkinson, 297 U.S. 157 (1936); McNello v. John B. Kelly, Inc., 283 F. 2d 86 (C.A. 3, 1960).

We have carefully considered all of appellant's other arguments and find them to be without merit. The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third circuit.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18,424

UNITED STATES OF AMERICA

vs.

STANLEY J. POLACK,

Appellant

(D. C. Criminal No. 169-69)

ON APPEAL FROM THE UNITED STATES DISTCRIT COURT
FOR THE DISTRICT OF NEW JERSEY

Present:

KALODNER, STALEY and GIBBONS,
Circuit Judges

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 1, 1969, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN,
Clerk

April 5, 1971

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1660

STANLEY J. POLACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a New Jersey lawyer and county court judge, admittedly (R. 242a-243a, 228a)[1] failed to file his 1962, 1963, 1964, 1965, and 1966 income tax returns until June 3, 1968, and was found guilty, after a jury trial, of having willfully failed to file those returns at the required times, in violation of Section 7203 of the Internal Revenue Code of 1954

[1] "R." references are to the appendix filed in the court of appeals.

(26 U.S.C.). He was fined $2,000 on each of the five counts.

Petitioner's explanation, as stated to the investigating agent in 1967 (R. 46a-47a), and as stated in his trial testimony (R. 262a, 270a-272a) was lack of time, due to the burden of assuming the duties of a fulltime judge in 1959, followed, in later years, by a fear of revealing his failure to file the 1962 return. Petitioner's 1955, 1956 and 1958 returns were admittedly (R. 246a-247a) not filed until September 8, 1959, and petitioner testified that he assumed he could settle his liability for 1962, 1963, 1964, 1965 and 1966 in the same manner as he had settled his liability for 1955, 1956 and 1958, namely, by payment of civil penalties and interest (R. 245a). The tax returns which petitioner filed on June 3, 1968, for the five prosecution years, *supra*, showed a total of $16,069 in taxes withheld from his judicial salary and a total of $19,271 in taxes due as computed by petitioner, and he testified that he had entertained no intent to defraud the United States and had believed that his tax liability in excess of taxes withheld would be "minimal * * * insubstantial." (R. 257a.)

There is no merit to petitioner's contention (Pet. 11-12) that the prosecutor pursued an unfair and prejudicial line of cross-examination of petitioner's character witnesses. Only one of the prosecutor's questions of which petitioner now complains was the subject of an objection in the trial court, and, as noted by the court of appeals (Pet. App. A, p. 4a), the cross-examination was "relevant to issues raised

by the appellant" and "a proper inquiry into testimony voluntarily elicited from the witnesses on direct examination." The one objection made by petitioner was to the question (R. 360a):

> Do you believe that his personal behaviour, not only upon the bench and in the performance of his judicial duties, but also in his every-day life should be beyond reproach?

The character witness on the stand, a State senator, had testified on direct examination that he had never had any regrets about having moved petitioner's name for confirmation as a judge by the State Senate (R. 353a-354a), and he later added on cross-examination that he considered petitioner's failure to file tax returns to have been "stupid but not criminal" (R. 366a). It was, therefore, no abuse of discretion for the trial judge to allow the prosecutor to probe the standards on which this witness based his testimony (R. 354a) that petitioner had a good reputation for honesty and integrity. *Michelson* v. *United States*, 335 U.S. 469, 479; *Glasser* v. *United States*, 315 U.S. 60, 83.

Petitioner contends (Pet. 12-18) that the prosecutor unfairly stressed his judicial position in his final argument to the jury. As noted by the court of appeals (Pet. App. A, p. 2a), there was no timely objection by petitioner to the prosecutor's argument, and the argument was not improper in view of petitioner's emphasis on the defense that his judicial labors had hindered him from filing timely tax returns and in view of defense testimony that peti-

tioner's omission was "stupid but not criminal" (R. 366a) and deserved only an assessed penalty (R. 340a).

Petitioner contends (Pet. 19-21) that willfulness was not sufficiently proven or accurately explained by the trial court to the jury. As noted by the court of appeals (Pet. App. A, p. 4a), however, the trial court twice gave the jury instructions on willfulness which correctly and adequately stated the law (R. 411a, 420a-421a) and petitioner's counsel made no objection to the instructions given. The trial court instructed the jury on willfulness as follows (R. 411a):

> Thus, before you can find that the defendant's failure to file in this case was wilful, you must be satisfied beyond a reasonable doubt that it was voluntary and purposeful, and with the specific intent to fail to do that which the law requires to be done, that is to say, with bad purpose, or evil motive, to either disobey or disregard the law.
>
> The only bad purpose or evil motive the government must prove in this case is the deliberate intention on the part of the defendant not to file income tax returns, which he knew that he was required by law to file, in order to prevent the government from getting that which it was lawfully entitled to receive, namely, a tax return for each of the years involved in this case. Whether or not taxes were due and owing for any of the years involved is beside the point. It is the wilful failure to make a timely return that violates the law.

This instruction was a correct application of Section 7203 and of *Spies* v. *United States*, 317 U.S. 492, 495-496. And see, *Sansone* v. *United States*, 380 U.S. 343, 354.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

JOHN P. BURKE,
JOSEPH H. REITER,
Attorneys.

JUNE 1971.

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